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FILED
JUL 21 1972

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1661

MOVEABLE OFFSHORE, INC.,
Petitioner,

vs.

EARL HALL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE JUDGES OF SAID COURT:

QUESTIONS PRESENTED

I. Did the Court of Civil Appeals render a decision on a State question in a way in conflict with applicable State law when it ruled that an owner/occupier owes a duty under Texas law to the employee of its subcontractor to provide him with a safe place to work?

II. Did the Court of Civil Appeals abuse its discretion in placing this case on its summary calendar sua sponte, and considering it without oral argument?

III. Did the Court of Civil Appeals err in reversing and remanding this case for entry of judgment on the jury verdict for the Respondent?

COUNTER-STATEMENT OF THE CASE

For the Court to have a complete picture of the case Respondent directs the Court's attention to Appellant's "Statement of the Case" found in its Brief on file with the papers of this cause.

PETITION ASSERTS NO REASON FOR GRANTING WRIT UNDER RULE 19

The Petition does not directly or affirmatively show wherein there is any reason for granting certiorari in this case encompassed within Rule 19 of this Court. Petitioner has failed to show that Court below is in conflict with Texas law on an important state question, that the Court below abused its discretion so as to raise an important Federal question, or that the Court below is in conflict with this or any other Federal Court or has decided an important question of Federal law which should be settled by this Court.

As none of the basic reasons set forth in Rule 19 of this Court governing the granting of certiorari are present in this case, the Respondent respectfully submits that the Petition should be denied.

I.

The Court Below Followed the Controlling Texas Law on the Question of the Duty Owed by an Owner/Occupier to the Employee of Its Subcontractor to Provide Him with a Safe Place to Work.

Petitioner cited the five cases mentioned in its Petition in both its Motion for Rehearing and its Appellee's

Brief. Respondent respectfully directs this Court's attention to the Fifth Circuit opinion found at pages A1-A6 of Petitioner's Appendix "A" and to Appellant's Brief and Appellant's Reply Brief. Respondent by so directing does not wish to imply that it is taking a cavalier attitude; however, for the sake of brevity it feels that it has amply discussed this point and it would serve no purpose to this Court, unless directed otherwise, to write the same twice.

II.

The Court Below Did Not Abuse Its Discretion in Placing This Case on Its Summary Calendar Sua Sponte, and Considering It Without Oral Argument.

Respondent would point out to this Court that the Fifth Circuit Rule 18, 28 U.S.C.A., 1972 Pocket Part, page 58, has been explained by the Fifth Circuit in the case of *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York, et al.*, 431 F.2d 409 (5th Cir., 1970), and this Court has upheld its practice in *United States* v. *Ambers*, 416 F.2d 942 (5th Cir., 1969), cert. den. 90 S.Ct. 686; *In re Louisiana Loan & Thrift Corp.*, 416 F.2d 898 (5th Cir., 1969), cert. den. *Holahan* v. *Reynolds*, 90 S.Ct. 912.

Petitioner decided the case was of grave import for the exercise of its vocal cords only after it was about to run out of Courts, but failed to assert the importance of its position for oral argument to the Fifth Circuit on any occasion past.

III.

The Court Below Properly Entered Judgment on the Verdict for Respondent.

A. Petitioner Filed No Motion for New Trial in Compliance with Rule 50, F.R.C.P., 28 U.S.C.A., Pages 375-376.

Petitioner filed what was entitled a Motion for Judgment notwithstanding the verdict and an alternative Motion for New Trial. (Appendix, pages 57-58). But for what relief did Petitioner pray? Its Motion relating to a new trial stated,

> "In the alternative, *if the foregoing motion is not granted,* the Defendant moves the Court for an order vacating and setting aside the verdict of the jury, and granting the Defendant a new trial, . . ." (Appendix, page 57) (Emphasis added)

Although this Supreme Court in considering the practice under Rule 50 as it relates to a conditional or alternative motion for new trial concluded that the phrase "'in the alternative' means that the things to which it refers are to be taken not together but one in the place of the other." *Montgomery Ward & Co.* v. *Duncan,* 61 S.Ct. 189, 194. Respondent would point out that the trial court gave Petitioner exactly that for which it prayed—Judgment notwithstanding the verdict. (Appendix, pages 89-90).

In essence the Court has said that the second ruling must be made, but it does not come into being unless the first ruling is vacated on appeal. But, is there anything in Rule 50 or any other rule which says that Petitioner cannot condition its motion on something other than an Appellate decision overruling the trial court holding for judgment notwithstanding the verdict? Respondent respectfully submits there is not! Petitioner can, it is sub-

mitted, condition its motion upon the happening of any event; and Petitioner herein conditioned its motion on the event, and none other, that the Trial Judge must not grant its motion for judgment notwithstanding the verdict. When the Trial Court ruled in favor of Petitioner on its motion for judgment notwithstanding the verdict Petitioner had no motion for new trial pending before the Court and it is obvious that Petitioner was of the same understanding. The Trial Court completed its duty to Petitioner and by Petitioner's own motion, there was nothing left undone by the Trial Court.

Are we to now say to the Petitioner and the Trial Court, "Petitioner, the Trial Court is not to rule upon the plain language of your motion and Trial Court, you are not to rule in accordance with the plain language of Petitioner's motion, but you are instead to measure Petitioner's motion by its unexpressed intention or wants, if any, or if not supply them for Petitioner." This court, however, laid down a different rule in *Johnson* v. *New York, N.H. & H.R. Co.*, 73 S.Ct. 125. In that case it was held that where a party files a motion for a directed verdict it cannot argue that it was intended to be a motion for judgment in its favor or a new trial. At page 127 of that opinion this Court wrote:

> "The defect in this argument is that Respondent's motions cannot be measured by its unexpressed intention or wants. Neither the trial judge nor the Court of Appeals appears to have treated the motion to set aside the verdict as asking for anything but that. And surely Petitioner is not to have her opportunity to remedy any shortcomings in her case jeopardized by a failure to fathom the unspoken hopes of Respondent's counsel. Respondent's motion should be treated as nothing but what it actually was,

one to set aside the verdict—not one to enter judgment notwithstanding the verdict."

We have a similar situation here. Was it the duty of the trial court to point out to Moveable that it could have an alternative ruling for a new trial? Was it the duty of Earl Hall to point out that Moveable could assert, in addition to its motion for judgment notwithstanding the verdict, a motion for new trial in the alternative? Was it the duty of the Fifth Circuit to change the wording of its motion for new trial when Moveable never asked it to? Does everyone have a duty to Moveable and Moveable have no duty? Does Moveable have no duty to the Trial Court to fairly appraise it of what remedy it is seeking? Does Moveable have no duty to Earl Hall to fairly appraise him of the true import of its motion, to with vigor and tenacity assert its right to a ruling, or must Earl Hall be forced to convince the Trial Court that Moveable did not mean what it said and that it must rule on a motion for new trial or fall victim to Moveable's ping-pong diplomacy in the Federal Judiciary, forever moving from court to court? Does Moveable have no duty to the Fifth Circuit to fairly appraise it of Moveable's alleged Motion for New Trial pending in the Trial Court?

If this Court grants this writ and rules that this case must be remanded to the Trial Court for a decision as to whether or not Moveable is entitled to a new trial, it is saying in effect that everyone owes a duty to Moveable, but Moveable owes no duty to anyone. The question of duty got us in the courthouse in the first place. Moveable contends it has no duty to provide a safe place to work and now contends that it has no duty to the Federal Courts—at least Moveable has been consistent.

Additionally, Respondent would bring to the Court's attention *Neely* v. *Martin K. Eby Construction Co.*, 87 S.Ct.

1072, wherein it was stated at page 1080, along with other matters of interest, that:

> "It was, of course, incumbent on the Court of Appeals to consider for new trial questions in the light of its own experience with the case. But we will not assume that the Court ignored its duty in this respect, although it would have been better had its opinion expressly dealt with the new trial question."

Therefore, it would appear that both the Court of Appeals and the Trial Court did its duty unto Moveable not as Moveable had done its duty unto them, but had considered that it had no motion pending in the Trial Court, possibly for reasons as set out by Respondent above or for other reasons known only unto themselves.

B. Petitioner Abandoned Its Motion for New Trial, If Any, Because of the Absence of Any Attempt to Secure a Disposition of Motion.

For the sake of this portion of Respondent's brief, we shall assume that Petitioner in the first instant presented to the Trial Court an alternative, conditional motion for new trial which has not been ruled upon. Therefore, assuming that Petitioner has filed an alternative motion for new trial which was not ruled upon by the Trial Court the question then becomes does that motion have a shelf-life or does it have an existence which can be extinguished only when ruled upon by a trial judge. Or, put another way, must the movant affirmatively state somewhere in the proceedings that it is not his intention to have a ruling—that he has abandoned the motion, or may the Trial Court and the Appellate Court safely assume that where the movant never presses for a ruling at the Trial Court, nor briefs his points in his trial brief, nor assigns error in the Appellate Court, nor briefs the point in his Appel-

late brief, nor prays for a remand for a ruling, he has abandoned the motion?

Respondent respectfully submits that if the above facts are present there has been an abandonment of the motion for new trial.

The sequence of events are thus:

March 22, 1971, Petitioner filed motions entitled: MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT UNDER F.R.C.P., RULE 50 (B) AND IN THE ALTERNATIVE MOTION FOR A NEW TRIAL UNDER F.R.C.P., RULE 50 (C). (Appendix, pages 57-58).

March 22, 1971, Petitioner filed its BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. (Appendix, pages 59-69). No mention being made of the motion for new trial.

June 21, 1971, Trial Court entered ORDER GRANTING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. (Appendix, pages 88-89).

June 24, 1971, Trial Court entered JUDGMENT FOR THE DEFENDANT NOTWITHSTANDING THE VERDICT.

November 16, 1971, Petitioner filed its APPELLEE'S BRIEF. Under heading, "B Course of the Proceeding," pages 2 and 3, Petitioner wrote in connection with its motion for new trial:

> "Moveable timely filed its motion for judgment notwithstanding the verdict under Rule 50 (B), F.R.C.P. and in the alternative, a motion for new trial under Rule 50 (c), F.R.C.P. (App. 71-88) granted the motion for judgment notwithstanding the verdict. (App. 88-89)."

Nothing was said anywhere else in the brief about the motion for new trial. As a matter of fact, under the heading "CONCLUSION", page 17, it asked for relief that, "Moveable prays that the judgment of the District Court be affirmed."

February 22, 1972, the Court of Appeals reversed the Trial Court and ordered that the jury verdict be reinstated, and Moveable discovered it had a duty for the first time, at law.

March 3, 1972, Moveable filed its PETITION FOR REHEARING OF MOVEABLE OFFSHORE, INC., THE DEFENDANT-APPELLEE, wherein Moveable, after having discovered that it had a duty to Earl Hall, tried once again to pass its duty on to others. For the first time Moveable made complaint that it had a pending motion for new trial, thereby attempting to place the duty upon the Appellate Court to send the case to the Trial Court to assume the duty to pass upon its motion for new trial. On page 6 of its petition for rehearing without citing authority, under the heading, "THE POINTS OF LAW WHICH THE COURT HAS OVERLOOKED OR MISAPPREHENDED," Moveable wrote:

> "10. If the Court reverses the Judgment of the Trial Court, it should remand the case for the determination of Defendant's alternative Motion for a New Trial which was not decided by the Trial Court."

and at page 12,

> ". . . and in the alternative, it prays that if the Court does reverse the judgment of the trial court, that the court remand the same for the disposition of Defendant's alternative motion for a new trial, . . ."

June 21, 1972, Moveable filed its PETITION FOR WRIT OF CERTIORARI.

Therefore, from March 22, 1971, to March 3, 1972, there is no mention anywhere in this Record of Petitioner asserting any right to have its motion ruled upon. Why is this? Was Petitioner convinced that his judgment notwithstanding the verdict would withstand an attack by Earl Hall? Did Petitioner forget about the motion, and only remember it when its case turned from sweet wine to vinegar?

Although Petitioner cites only two cases from the Ninth Circuit, *Gordon Mailloux Enterprises* v. *Fireman's Insurance Company of Newark, New Jersey*, 366 F.2d 740 (9th Cir., 1960) and *Minthone* v. *Seeburg Corporation*, 397 F.2d 237 (9th Cir., 1968), which Respondent will discuss later, no discussion of Rule 50 is complete without an understanding of the *Montgomery Ward* case cited earlier.

There are three important points as relates to this case in *Montgomery Ward*. They are:

(1) That the Court there did not say that a party could not elect to proceed on its motion for judgment and in effect withdraw or abandon its motion for new trial.

> "While we took the case to review the Circuit Court's construction of the rule, it is true that if the defendant elected to stand on its motion for judgment and, in effect, withdrew its motion for a new trial, we do not reach the question involved in our grant of certiorari." *Supra* at page 193.

(2) In that case the Court did find that there was no election or withdrawal under the facts.

(3) The Court in 1940 found the procedure permitted by Rule 50 to be "novel" and the practice at that

time was for the defendant and trial judge to expect the motion for new trial to be left for a later disposition if the Appellate Court should overrule the judgment on Appeal. There can be no such expectations on the part of Petitioner here. The *Montgomery Ward* case has been around for some 32 years and the Rule has been the same, although amended in 1963 to conform to the practice already in existence. See the *Neely* case where this Court held that the 1963 amendments were made to implement the earlier Court decisions, and the Committee Reports, 31 F.R.D. 654.

This language, that the 1963 Amendments did not change the existing rules, is important to Respondent's position when we consider the case of *Vera Cruz* v. *Chesapeake & Ohio Railroad*, 312 F.2d 330 (7th Cir., 1963), cert. den. 84 S.Ct. 44. The *Vera Cruz* decision was handed down January 10, 1963, rehearing was denied February 14, 1963, Rule 50 was amended January 21, 1963, and became effective July 1, 1963. It is, therefore, safe to assume that the 7th Circuit knew of the amendments and that, in any event, the existing practice was not changed but only clarified.

In *Vera Cruz* the trial court found a conflict between the general verdict and the special interrogatories, therefore, a judgment notwithstanding the verdict was entered for defendant. Defendant had filed a motion for judgment notwithstanding the verdict which was joined with an alternative motion for new trial. The District Court did not rule on the motion for new trial. Plaintiff appealed and the Appellate Court reversed the Trial Court grant of judgment notwithstanding the verdict and remanded for entry of judgment on verdict for plaintiff.

The Court stated at page 332,

> "Appellees cite Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940), as requiring this court to remand for a ruling on their alternative motion. *But their brief fails to argue the application of that rule here.* In Montgomery Ward there was a sustained effort to have the District Court rule on the alternative motion under Rule 50 (b). There is no showing here that any similar attempts were made after judgment notwithstanding the general verdict was entered under Rule 49 (b). *On this record the District Court might, with jurisdiction, have assumed that Appellees had abandoned the motion.*" (Emphasis added)

The case before this Court is even stronger for the proposition that Petitioner had abandoned its motion for new trial. In *Vera Cruz,* Defendant had raised the issue in the Appellate Court, here Petitioner never raised it until its motion for rehearing.

Nowhere in Petitioner's Brief nor in its Motion for Rehearing does it argue the application of Rule 50. See page 332 of *Vera Cruz.* Moveable never raised any argument until after judgment by the Fifth Circuit, and even then failed to show the application of Rule 50 to it; therefore, this Honorable Court can with justification assume, as the Fifth Circuit and Trial Court apparently did, that Petitioner had abandoned the Motion for New Trial.

Although Respondent agrees that at the Trial Court Petitioner had a right to file a motion for conditional ruling for new trial, and had a right to have a ruling on the motion, Respondent feels that Petitioner also has a right to abandon that Motion, however, if Petitioner wishes to assert that right, and does not abandon that right there

is no reason why Petitioner may not, and *should not,* cross-assign error, in the appellant's appeal, for the failure of the trial judge to rule on its Conditional Motion for New Trial.

This Court in the *Montgomery Ward* decision, pages 195-196, saw

> ". . . no reason why the appellee may not, and *should not, cross-assign error,* in the appellant's appeal to rulings of law at the trial, so that if the appellate court reverses the order for judgment n.o.v., it may pass on/the error of law which the appellee asserts nullify the judgment on the verdict." (Emphasis added)

Should not the rule be that where the appellee is granted judgment notwithstanding the verdict and there is no ruling upon his motion for new trial *he may and should* in order to show the Appellate Court that he has not abandoned that motion cross-assign error in the appellant's appeal so that if his judgment notwithstanding the verdict is overruled he can have his case remanded for a ruling on his motion for new trial, and that if the appellee does nothing at the trial level to assert his right to a ruling and does nothing at the Appellate level to assert his right to a ruling, he can fairly be treated as having abandoned that motion for new trial? Fairness to the trial court, the Appellate Court and Appellant, and a fair reading of the rules would seem to dictate that an Appellee, Petitioner here, cannot abandon his motion and then at some later stage in the proceedings when all seems lost be able to say, "King's—X."

Moveable, in its Petition for a Writ of Certiorari to this Court cites *Gordon Mailloux Enterprises* and *Minthone* for the proposition that there is a conflict between the decision in the Fifth Circuit opinion of this case and

that it is entitled on the strength of the above two opinions to have this case remanded to the trial court for a decision by the trial court on its motion for new trial.

There is no conflict. The decision by the Fifth Circuit is well supported by the decision of the Seventh Circuit in the *Vera Cruz* case. Although the Fifth Circuit in this case did not write on the question of new trial in its opinion and expressed no opinion as to Petitioner's Motion for Rehearing, this Supreme Court can assume as it did in *Neely* v. *Martin K. Eby Construction Co.*, 87 S.Ct. 1072, rehearing denied, 87 S.Ct. 1366, that,

> "It was, of course, incumbent on the Court of Appeals to consider the new trial question in the light of its own experience with the case. But we will not assume that the Court ignored its duty in this respect, although it would have been better had its opinion expressly dealt the new trial question." (87 S.Ct. 1072, 1080)

Defendant in *Minthone* unlike Petitioner in this case briefed its contention that it had a right to a ruling on its motion for new trial as to damages, and in the *Mailloux* case, Defendant raised the point on appeal and vigorously asserted its right to have the motion heard by the Trial Court.

C. Petitioner Waived Any Rights It Might Have to Have Motion for New Trial, If Any, Ruled upon by Trial Court by Failing to Bring It to Attention of Court of Civil Appeals until It Filed Its Motion for Rehearing.

Although the concept of waiver and abandonment are similar, waiver is properly in the realm of a conscious choice, or that the surrounding circumstances are such that one could reasonably infer that the party's failure to act in a given situation where he knew or should have

known by the exercise of reasonable care and diligence that a right would be lost if he took no affirmative action, and, therefore, it is imputed to him a conscious choice to abandon a known right by that course of action. However, waiver, it would seem, has elements other than a conscious relinquishing of a known right. It infers that the party may have through negligence, ignorance, inadvertance, or the like forgone the implementation of some right which he may have been entitled to because there is no excuse for his not knowing the right existed.

A party who has a right to a ruling or lack of a ruling or to attack a judgment brought up for review by another ought to fairly be obliged to give advance notice of his intention to assert that right by the fairly simple and inexpensive method of bringing it to the attention of the appellate court, either by filing his own notice of appeal, cross-assigning error in his brief, or merely pointing out the error in his brief. It would seem that the party who initiates review is entitled to such notice, and neither this court nor the Fifth Circuit, nor the other overburdened reviewing courts ought to be obliged to permit an appellee, Moveable Offshore, to now exhume claims so frivolously pressed below that they are forgotten until the time for applying to a U. S. Court of Appeals for a motion for rehearing arrives, or to this Court for Certiorari, when such was not even entertained as a point or prayer at any other stage in the proceedings.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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By .....
YANCEY WHITE

CERTIFICATE OF SERVICE

I, Yancey White of Allison, Maddin, White & Brin, attorneys for Respondent, do hereby certify that I have mailed a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari, to John H. Benckenstein of Benckenstein & Norvell, P. O. Box 551, Beaumont, Texas 77704, Counsel for Petitioner, on this the 19th day of July, 1972.

.....
YANCEY WHITE